Nos. 20,293, 20,295

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

D. I. OPERATING CO., a Nevada Corporation, *Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

vs.

UNITED RESORT HOTELS, INC., a Delaware Corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware Corporation, as successor to WILBUR CLARK'S DESERT INN CO., a dissolved Nevada Corporation, *Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

vs.

DESERT INN OPERATING COMPANY, a Nevada Corporation, *Appellee.*

On Appeals from the Judgment of the United States District Court for the District of Nevada

BRIEF FOR THE APPELLANT

RICHARD M. ROBERTS,
Acting Assistant Attorney General
MEYER ROTHWACKS,
JEROME FINK,
Attorneys,
Department of Justice,
Washington, D. C. 20530
Attorneys for Appellant.

Of Counsel:
JOHN W. BONNER,
United States Attorney

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the court below is reported at 239 F. Supp. 78.

JURISDICTION

These three cases, consolidated for trial and on appeal, involve actions by the three corporate plaintiffs to recover $163,310.87 alleged to have been overpaid in wagering taxes for the period April, 1953, through April, 1959. These taxes were paid in August, 1957, June, 1958, and April, 1959 (I-R. 46-47); and timely claims for refund were thereafter filed. Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the Internal Revenue Code of 1954, on March 10, 1960, these actions were brought in the District Court for recovery of the taxes paid. (I-R. 1-8, 12-15, 18-22.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The trial court's memorandum opinion was filed on January 4, 1965. (I-R. 28-40.) Findings of fact and conclusions of law and judgment were entered on March 24, 1965. (I-R. 41-50.) Within sixty days thereafter, on May 21, 1965, notices of appeal were filed. (I-R. 51-53.) Jurisdiction is vested in this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the trial court erred in holding that taxpayers were not subject to the wagering tax on proceeds of a wagering pool conducted by them in conjunction with a professional golf tournament; and in declaring invalid Treasury Regulations on Wagering Tax, Section 44.4421-(c)(4), providing that a wagering pool "operated with the expectancy of a

profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

2. Whether the trial court erred in finding and concluding that taxpayers had not realized a direct pecuniary benefit from this wagering pool, that is, a share of the pool itself.

STATUTES AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra.*

STATEMENT

The three corporate appellees at various times during the period involved managed and operated Wilbur Clark's Desert Inn, a well-known resort hotel and gambling casino in Las Vegas, Nevada.[1] (I-R. 42-43.)

Beginning in April, 1953, the Desert Inn conducted on its golf course a professional golf tournament, known as the "Tournament of Champions." In conjunction with this Tournament, and as a part of it, the Desert Inn also conducted a wagering pool, commonly called a Calcutta. (I-R. 43-44.)

This pool was conducted in the following manner: On the night preceding opening of the Tournament, a dinner was held in the Painted Desert Room of the Inn, with a large group of persons, including a select

[1]For convenience, further reference will be to "Desert Inn", the "Inn" or to "taxpayers".

group of newsmen, being admitted. (II-R. 44.) With various celebrities serving as auctioneers, golfers entered in the Tournament were auctioned off. The name of the successful bidder, and the amount bid, were written on a blackboard after the name of the player who had been purchased. This blackboard was prominently displayed during the course of the Tournament. (II-R. 26-27.) At the conclusion of the Tournament, the gross amount in the pool, minus ten percent, was distributed to the winning bidders. The gross amounts in the pool during the years in issue were (I-R. 29):

1953	$ 93,250
1954	137,850
1955	202,500
1956	129,000
1957	265,650
1958	266,000
1959	380,000

The Calcutta was held in conjunction with the first tournament conducted by the Desert Inn. The Calcutta had been objected to by the Desert Inn's golf professional who had conceived the format for the Tournament of Champions, but the officials of the Inn nonetheless determined to hold it. They also determined to obtain the sponsorship of a charitable organization. (II-R. 13-18.)

It was decided to approach the Damon Runyon Fund for Cancer Research (hereinafter called the Damon Runyon Fund or the Fund), a tax-exempt

organization, well-known to members of the sports and entertainment world (II-R. 27), for purposes of obtaining the sponsorship of that organization. Contacting Mr. Walter Winchell, prominent newspaperman, and Mr. Teeter, the executive assistant of the Damon Runyon Fund, taxpayers' officers first offered the Fund ten percent of the total amount bid in the pool in return for use of the Fund's name. This proved not to be acceptable, and finally taxpayers orally agreed to pay the Fund $35,000 a year, or ten percent of the pool, whichever was greater. At the time this agreement was entered into, it was assumed by taxpayers' officers that ten percent of the pool would fall substantially short of the minimum guarantee of $35,000 a year, but taxpayers deemed it "worthwhile" to put in the "extra money." (II-R. 18-20, 27-29.) Taxpayers' purpose in agreeing to pay $35,000 a year for use of the Fund's name was business, not charity; or, as the court below stated: "The pool was not operated for charity."[2] (I-R. 33.)

After the agreement to pay $35,000 had been made, the golf Tournament was widely advertised and publicized as sponsored by the Damon Runyon Memorial Fund. (II-R. 25, 74, 86.) Extensive publicity was also given to contributions by the Desert Inn or, as it was

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[2]This statement was amply justified by the evidence which, among other things, showed that the Inn's contributions to the Fund in 1952, the year before the $35,000 agreement, amounted to only $672. (II-R. 31.) Moreover, the evidence disclosed that the Inn had successfully contended to the Revenue Service that the $35,000 payment was deductible for income tax purposes as an ordinary and necessary business expense rather than subject to the limitations on charitable contributions. (II-R. 87-90.)

sometimes stated, by Wilbur Clark to the Damon Runyon Fund. (II-R. 72-73, 76-77.)

The Desert Inn paid the guaranteed $35,000 by checks to the Damon Runyon Fund transmitted before the Tournament and Calcutta were held. In most years, these payments were made several months prior to the Tournament. (II-R. 47-48.) On its books of account, the Desert Inn established an account in which it entered all items of income and expenses pertinent to the over-all operation of the Tournament, including the Calcutta. The $35,000 payment to the Fund was recorded as an expense; the ten percent share of the pool which the Inn retained was recorded as an income item under the label "Share of Calcutta Auction." (II-R. 51-53.) Expenses of the Tournament exceeded the income from it and the excess was deducted on taxpayers' income tax returns as advertising, promotion and publicity business expenses. (II-R. 55.)

Taxpayers did not dispute that the Desert Inn benefited from the conduct in the Calcutta in the following ways: (1) increased gambling receipts at the Desert Inn casino from the persons invited to the Calcutta auction; (2) increased sales of food and drink by the Desert Inn to those persons invited to the Calcutta auction; (3) increased attendance at the Tournament of Champions where admission charges were made and refreshments sold; and (4) increased gambling and other hotel profits at the Desert Inn, both during the period of the Tournament and throughout the year as a result of publicity and advertising. (I-R. 26-27.)

SPECIFICATION OF ERRORS RELIED UPON

The District Court erred in finding and concluding that taxpayers were not subject to the wagering tax on the proceeds of a wagering pool conducted by them in conjunction with a professional golf tournament and erred in holding invalid Treasury Regulations providing that a wagering pool "operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax." The trial court further erred in finding and concluding that taxpayers had not derived a direct profit from this wagering pool, that is, a ten percent share of the pool which taxpayers used to help defray one of their ordinary and necessary business expenses.

SUMMARY OF ARGUMENT

The wagering tax statutes impose a tax on wagering pools "conducted for profit." The statutory language and its underlying legislative history show that Congress intended to tax all commercialized gambling, whether the profits be directly or indirectly realized, and intended to exclude from the wagering tax provisions only friendly or social pools without commercial implications. Even assuming, *arguendo,* that there is some ambiguity as to whether the statute intended to cover pools conducted for indirect as well as direct profits, Treasury Regulations defining the statutory phrase "conducted for profit" to cover indirect profits are, at the least, a permissible and reasonable con-

struction of the statute. The District Court erred, therefore, in holding that the statute did not tax wagering pools conducted for indirect pecuniary benefit and erred in declaring the Treasury Regulations invalid.

Even if it be assumed that the statute requires, for taxability, a pool conducted for a direct pecuniary benefit, that is, a share of the pool itself, taxpayers in this case realized such a benefit. The taxpayers had agreed to pay to a charitable organization, for the use of its name and with attendant publicity, the sum of $35,000 a year. This constituted and was treated as a business expense of the taxpayers, not a charitable contribution. Taxpayers kept ten percent of the wagering pool as partial reimbursement for the $35,000 payment they had already made. Thus, since taxpayers used part of the proceeds of the wagering pool to reimburse themselves for amounts constituting a part of their ordinary and necessary business expenses, the taxpayers realized a direct pecuniary benefit from their wagering pool to the extent of this reimbursement.

ARGUMENT

I

THE INCREASED PROFITS OF THE DESERT INN RESULTING FROM THE CALCUTTA SUBJECTS THIS POOL TO THE WAGERING TAX AND THE DISTRICT COURT ERRED IN DECLARING INVALID TREASURY REGULATIONS SO PROVIDING

The Desert Inn, a commercial enterprise, for business purposes conducted a golf tournament and, as an integral part, conducted a wagering pool or Calcutta. The Calcutta was a gambling operation of magnitude, with gross receipts rising in the last year involved to nearly four hundred thousand dollars. Ten percent of this wagering pool was retained by the Desert Inn as partial reimbursement for a business, not a charity, payment to the Damon Runyon Fund, whose name was widely publicized as the sponsor of the golf tournament. The Desert Inn admittedly reaped financial benefit from the Calcutta in the form of increased gambling and other hotel profits both during the period of the Tournament and thereafter. Nonetheless the trial court held that the Calcutta had not been "conducted for profit" within the meaning of Section 3285 of the Internal Revenue Code of 1939 and Section 4421(1)(B) of the Internal Revenue Code of 1954, Appendix A, *infra*. The trial court also declared invalid Treasury Regulations on Wagering Tax, Section 44.4421-1(c)(4), Appendix A, *infra,* which provides:

Sec. 44.4421-1 *Definitions.*

* * * *

(c) *Other terms used*——

* * * *

> (4) *Conducted for profit.* A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

This decision, we submit, misconceived the statutory intention; but, at the very least, it disregarded the well-settled principle that, while Treasury Regulations may not contravene a statute, they may adopt a construction falling within its permissible limits.

The trial court's decision proceeded from the premise that the term "conducted for profit" clearly and unambiguously required a showing of a direct pecuniary benefit, that is, a share of the pool itself.[3] This premise is unsound.

The term "profit" does not, either as a matter of dictionary definition or in the statutory context, require either "a net profit" or a "direct profit"; but rather, on its face connotes all forms of pecuniary advantage or gain.

In the recent case of *Chappell & Co. v. Middletown Farmers Market & Auction Co.,* 334 F. 2d 303 (C.A. 3d), the court was confronted with a quite similar problem, a construction of the term "public perform-

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[3]In the second part of this argument, we will demonstrate that the Desert Inn did take a share of the pool; but we will assume, for purposes of argument at this point, that it did not.

ance for profit" within the meaning of the copyright laws. There the appellee, a shopping center, piped recorded, copyrighted music into the center for the entertainment of its customers. Answering the contention that this did not constitute a "performance for profit," the court stated (p. 306):

> The atmosphere created by the playing of recordings made shopping at the Mart more pleasurable and attractive to the patrons. Though this was not of direct pecuniary benefit, it was "for profit" to the degree that it was commercially beneficial to the Mart to have an attractive shopping atmosphere. It is against the "commercial, as distinguished for a purely philanthropic public use of another's composition" that the statute is directed. *Remick & Co. v. American Automobile Accessories Co.,* 5 F. 2d 411 (6 Cir. 1925.) See *Herbert v. Shanley,* 242 U.S. 591, 594-595, 37 S. Ct. 232, 61 L. Ed. 511 (1917). So long as there can be discerned a "material, tangible, commercial profit" in the rendition of musical compositions, it is for profit within Section 1(e). See Conference Rep. No. 2470, 82 Cong. 2d Sess. (1952); U. S. Code Cong. & Adm. News, 1952, p. 2310. See *M. Witmark & Sons v. L. Bamberger & Co.,* 291 F. 776 (D.N.J. 1923).

Both the statutory language and structure and the underlying legislative history make clear that Congress, using the term "conducted for profit" in the wagering tax statutes, similarly intended only to distinguish the wagering pool with a commercial purpose from a friendly or social one. Nowhere did Congress suggest that a lottery conducted for commercial rea-

sons and profit, whether the profit be direct or indirect, fell outside the scope of the tax.

The excise tax on wagers was introduced into the Internal Revenue Code by the Revenue Act of 1951. Its stated purpose was to have "commercialized gambling," without regard to its "legality or illegality" under state law, help meet the "need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens." H. Rep. No. 586, 82d Cong., 1st Sess., p. 55 (1951-2 Cum. Bull. 357, 397); S. Rep. No 781, 82d Cong., 1st Sess., p. 113 (1951-2 Cum. Bull. 458, 539).

The statute confined the tax to those wagers on sports events placed with a person engaged in the business of accepting such wagers. "The purpose of this requirement is to exclude from the tax the purely 'social' or 'friendly' type of bet." H. Rep. No. 586, *supra,* p. 55-56 (1951-2 Cum. Bull. 357, 397); S. Rep. No. 781, *supra,* p. 113-114 (1951-2 Cum. Bull. 458, 540). Similarly, a wagering pool with respect to a sports event is taxable if the pool is conducted for profit. "The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners." H. Rep. No. 586, *supra,* p. 56 (1951-2 Cum. Bull. 357, 398); S. Rep. No. 781, *supra,* p. 114 (1951-2 Cum. Bull. 458, 540).

The pool which was before the lower court was hardly a "friendly" office type pool, nor one in which "all" the wagers were returned to the participants. It was a widely publicized pool involving large sums, operated in conjunction with, and admittedly in profitable support of, a commercial enterprise. In treating the term "conducted for profit" to require, clearly and unambiguously, that the operator of the pool take a share of the gross receipts of the pool itself, the trial court has, we submit, too narrowly read the term "profit" and has, consequently, defeated Congressional intention.

In reaching its result, however, the lower court has not only misread statutory language and accompanying legislative history. It has read the statute to be so clear and unambiguous as even to prevent a construction treating the term "profit" as including both direct and indirect profit; for the District Court has struck down as invalid Treasury Regulations on Wagering Tax, Section 44.4421-1(c)(4), which so define the term.

While, of course, Treasury Regulations may not contravene a statute, it is equally well settled that Regulations promulgated by the agency charged with enforcing the law are to be given great weight and should not be overruled unless plainly inconsistent with the statute. *Commissioner v. South Texas Co.,* 333 U.S. 496, 501; *Fawcus Machine Co. v. United States,* 282 U.S. 375, 378; *Brewster v. Gage,* 280 U.S. 327, 336; and if a statute be deemed ambiguous, Regu-

lations construing it are both permissible and entitled to great weight. As the Court stated in *Koshland v. Helvering,* 298 U.S. 441, 446:

> Where the act uses ambiguous terms, or if of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts.

The Regulations struck down by the District Court are not only, we submit, a permissible and reasonable construction of the statute, which is all that is required, but they are far more in accord with the Congressional language and purpose than the restrictive interpretation successfully urged upon the court below by taxpayers.[4]

The District Court sought support for its holding in the 1941 case of *Deshler Hotel Co. v. Busey,* 36 F. Supp. 392 (S.D. Ohio), affirmed 130 F. 2d 187 (C.A. 6th) (I-R 38), involving the construction of an earlier version of the so-called cabaret tax statutes. The statute involved there shows the inappropriateness of the attempted analogy. The cabaret tax statute (Section 500(a)(5) of the Revenue Act of 1926, c. 27, 44 Stat. 9) which was involved in *Deshler* provided for a tax on amounts—

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[4]Similar Regulations were not promulgated under the 1939 Code which governs the years 1953 and 1954. Taxpayers made no point of this below, conceding that, if the Regulation were valid, judgment should be entered against them. (II-R. 13.) In any event, the result for the years 1953 and 1954 should be the same both because the permissible construction of the statute is the correct one and also for the reasons which will be set forth in the second portion of this argument.

> paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise; * * *.

Thus, under that statute, it was required that there be some charge for admission to the hotel dining room or that one be included in the prices charged for food or service. The trial court found that no charge for admission was made and that food prices were not increased and concluded the tax did not apply. The Court of Appeals, one judge dissenting, affirmed. It is true that the District Court, in addition to finding that there was no admission charge, indulged in dictum to the effect that the performance was not for profit since the music itself was a part of overhead and could not have been provided for a direct profit. This was not only unnecessary since the court had found no admission was charged, but it was contrary to the Supreme Court decision in *Herbert v. Shanley Co.,* 242 U.S. 591. In that case, the Court held that there had been a copyright infringement through a "public performance for profit" within the meaning of the copyright statutes even though the infringing hotel did not charge admission or increase its food prices. Through Justice Holmes, the Court said (p. 595):

> If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is *profit* and that is enough. (Italics added.)

In any event, the Court of Appeals in the *Deshler Hotel Co.* case affirmed without mention of the dictum below[5] because of the finding that there had been no charge for admission included in the prices for refreshment, service or merchandise.

Furthermore Congress amended the cabaret tax provisions in 1942 clearly to eliminate the requirement of an admission charge for imposition of the tax. (For a full development of the early history of the cabaret tax, including the changes made in 1941 and 1942, see *Lethert v. Culbertson's Cafe, Inc.*, 313 F. 2d 506, 509-511 (C.A. 8th).) Hence, since 1942, a performance is deemed to be for profit even where no admission is charged. The purpose of that enactment, as stated by the Senate Finance Committee Report (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 268 (1942-2 Cum. Bull. 504, 700)), was "to allay possible questions under the present statute" and "confirms the Treasury Department's interpretation of the present statute." Assuming, without agreeing, that this represented a change rather than a clarification of existing law, we do not see how it aids the taxpayers here.

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[5]The majority of the Court of Appeals held *Herbert v. Shanley Co., supra*, not pertinent because the applicable Treasury Regulations excluded orchestral music from the definition of public performance for profit for purposes of the cabaret tax. When analogies are sought, however, the statute under consideration in the case at bar is more like that involved in *Shanley* than like that involved in *Deshler* where there was a requirement of a charge or admission in addition to the requirement of a public performance for profit.

The pre-1942 cabaret tax statutes and the litigation involving them had concentrated on the requirement that there be some admission fee or increased charges imposed upon the patrons of the establishment, which requirements were generated by other elements of the statute than the term "public performance for profit." When litigation produced the problems Congress acted promptly to alter the emphasis of the statute from the necessity of admission fees or other increased charges and, as a part of these changes, made clear that the term "performance for profit" was not to be used by courts to restore emphasis on increased charges against the patrons.

Here, however, the wagering statute contains no requirement of admission fees. It simply taxes "wager placed in a wagering pool * * * if such pool is conducted for profit." The term "profit" itself, standing alone, calls for including any form of pecuniary advantage or gain, and there are no other elements of the statute to require that the gain must be a share of the pool itself. Moreover, as stated, the legislative history underlying the statute shows that only the friendly, office-type pool, without commercial implications, was intended to be excluded from coverage.

The District Court also seemed to place some reliance on the fact that the Tournament of Champions (including the Calcutta) showed an excess of expenditures over receipts (I-R. 30, 32); but as Justice Holmes said in *Herbert v. Shanley Co., supra* (p. 595), "Whether it pays or not the purpose of employ-

ing it is profit and that is enough"; and as the court in *Chappell & Co. v. Middletown Farmers Market & Auction Co., supra,* also construing the copyright infringement laws said (p. 306), "Though this was not of direct pecuniary benefit it was 'for profit' to the degree that it was commercially beneficial * * *. It is against the 'commercial,' as distinguished from a purely philanthropic public use of another's composition, 'that the statute is directed'." We submit that the same result was intended by Congress here.

Finally, the trial court "judicially notices" that in many taverns and beer parlors, wagering pools are conducted in conjunction with televised sports events with all proceeds being distributed to the winners and that the Government does not tax this. (I-R. 39-40.) If the court is referring to friendly bets made between customers at a neighborhood tavern or bar, or even a pool with the bartender holding the money but not sanctioned in doing so by the owners of the establishment, then the court is merely referring to the pool among friends or associates which is spoken of in the legislative history. If, however, the court is referring to a pool actually conducted by the owners of the establishment for the purpose of stimulating trade during telecasts of a sporting event, then such pools are deemed taxable by the Revenue Service and any failures to tax them are the result of oversight not design. See Rev. Bul. 54-256, 1954-2 Cum. Bull. 401 (ruling that the operation of a punch-board or wagering board by a merchant on his premises for the purpose of stimulating trade is subject to the wagering

tax even though the merchant gets no portion of the proceeds).

The court below has incorrectly construed the statute and has erroneously struck down Regulations, and we ask that its judgment be reversed. We will now proceed to show that, even if the statute were construed to require a direct pecuniary benefit, that is, a share of the pool itself, the Desert Inn on the facts of this case did realize such a direct pecuniary benefit.

II

THE DESERT INN REALIZED A DIRECT PROFIT FROM THE POOL SINCE TEN PERCENT OF THE POOL WAS USED TO SATISFY ONE OF THE INN'S BUSINESS EXPENSES

The Desert Inn, having decided that it wanted a sponsor, agreed to pay $35,000, or ten percent of the pool if greater, to the Damon Runyon Fund in return for its sponsorship. This was a business decision not an act of charity. Indeed, the Inn successfully contended before the Revenue Service in connection with it income tax returns that this $35,000 payment was a deductible business expense, not a charitable contribution subject to a limitation on deductibility. The $35,000 payment had been made to the Fund well in advance of the Tournament, and the Inn retained ten percent of the pool in partial reimbursement of the payment. On this state of facts, the trial court nonetheless rejected as "untenable" the Government's contention that the Inn had realized a direct

pecuniary benefit from the pool in that ten percent of the pool was used to satisfy one of the Inn's business expenses. (I-R. 32.) The court seems, in part, to have rejected the contention because the overall operations of the Tournament (including the Calcutta) produced a loss. (I-R. 32.)

The trial court's error here was to confuse the term "direct profit" with the term "net profit." If a gambler arranged to keep ten percent of a pool as profit, expecting it to cover his expenses, but found he had miscalculated, surely no one would suggest that the pool had not been conducted for profit because the operation showed a deficit. Similarly, if a department store ran a pool and kept ten percent of the pool to help defray the cost of newspaper advertisements for the store, no one should suggest that the pool had not been conducted for profit merely because the advertisements cost more than the ten percent.

But, in substance, this is precisely what occurred in the case at bar. The Desert Inn wanted the sponsorship of the Damon Runyon Fund. It agreed to pay $35,000 for this, expecting to recoup a portion of this payment from the Calcutta pool.[6] In return the

[6]In its formal findings the trial court found that the "bidders" in the auction "contributed" to the Fund. (I-R. 44.) If by this, the court meant that the bidders were advised that ten percent would go to the Fund, there is some evidence to support this (II-R. 36-37), although advertising and other publicity referred to the contributions as having been made by the Desert Inn or by Wilbur Clark. However, there can be no dispute that the payment to the Fund was by the Desert Inn, which thereafter retained ten percent of the pool in partial reimbursement.

Damon Runyon Fund permitted the use of its name as sponsor of the Tournament (including the Calcutta), and the Tournament of Champions and the Desert Inn realized substantial publicity, including national television advertising, from this sponsorship.

The District Court made no finding whether the payment was made to have the Fund sponsor the Calcutta or the entire Tournament (including the Calcutta). While taxpayers contended that the sponsorship was for the Calcutta alone, all the objective facts of record are to the contrary—all printed programs, advertising, and other publicity described the Tournament as under the sponsorship of the Fund. (II-R. 24-25, 73, 74-75, 76-79.) In any event, whether the $35,000 payment was for sponsorship of the Tournament or for sponsorship of the Calcutta, it was a business expense and the Inn was repaid a part of that expense with its ten percent share of the pool.

This, we submit, was as surely a direct pecuniary profit to the Desert Inn from the conduct of the pool, as if the ten percent share had been used to put the putting greens in shape or to pay a part of the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction. In short, even if, as we dispute, a pool where all of the receipts are distributed to the participants were deemed to be non-taxable, although operated to stimulate trade, there should be no question that such a pool becomes taxable if the merchant retains part of the money to defray a portion of the expenses of holding the event.

CONCLUSION

In view of the foregoing, it is asked that the judgment of the court below be reversed and judgment be entered for the United States.

Respectfully submitted,

RICHARD M. ROBERTS,
Acting Assistant Attorney General
MEYER ROTHWACKS,
JEROME FINK,
Attorneys,
Department of Justice,
Washington, D. C. 20530
Attorneys for Appellant.

Of Counsel:
JOHN W. BONNER,
United States Attorney

October, 1965.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD L. CARICO,
Assistant United States Attorney

(Appendices A and B Follow)

Appendix A

Internal Revenue Code of 1939:

SEC. 3285 [as added by Sec. 471(a), Revenue Act of 1951, c. 521, 65 Stat. 352]. TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) *Amount of Wager.*—In determining the amount of any wager for the purposes of this

subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * *

(26 U.S.C. 1952 ed., Sec. 3285.)

Internal Revenue Code of 1954:

SEC. 4401. IMPOSITION OF TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of Wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person, who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(26 U.S.C. 1958 ed., Sec. 4401.)

SEC. 4421. DEFINITIONS.

For purposes of this chapter—

(1) *Wager.*—The term "wager" means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) *Lottery.*—The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521,

if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(26 U.S.C. 1958 ed., Sec. 4221.)

SEC. 7805. RULES AND REGULATIONS.

(a) *Authorization.*—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

* * * *

(26 U.S.C. 1958 ed., Sec. 7805.)

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules.*—Except as otherwise provided in any section of this title—

* * * *

(4) *Subtitle D.*—Subtitle D of this title shall take effect on January 1, 1955. Subtitles B and C of the Internal Revenue Code of 1939 (except chapters 7, 9, 15, 26, and 28, subchapter B of chapter 25, and parts VII and VIII of subchapter A of chapter 27 of such code) are hereby repealed effective January 1, 1955. Provisions having the same effect as section 6416(b)(2)(H), and so much of section 4082(c) as refers to special motor fuels, shall be considered to be included in the Internal Revenue Code of 1939

effective as of May 1, 1954. Section 2450(a) of the Internal Revenue Code of 1939 (as amended by the Excise Tax Reduction Act of 1954) applies to the period beginning on April 1, 1954, and ending on December 31, 1954.

* * * *

(26 U.S.C. 1958 ed., Sec. 7851.)

Treasury Regulations 132 (1939 Code):

Sec. 325.20 *Effective period.* The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

Sec. 325.21 *Scope of tax.* (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.

(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

(d) A sports event includes every type of sports event, whether amateur, scholastic, or professional, such as horse racing, auto racing, dog racing, boxing and wrestling matches and exhibitions, baseball, football, and basketball games, tennis and golf matches, track meets, etc.

(e) A contest includes any type of contest involving speed, skill, endurance, popularity, politics, strength, appearances, etc., such as a general or primary election, the outcome of a nominating convention, a dance marathon, a log rolling, wood chopping, weight lifting, corn husking, beauty contest, etc.

* * * *

Treasury Regulations on Wagering Tax (1954 Code):

Sec. 44.4421-1 *Definitions.*

(a) *Wager.* The term "wager" means——

(1) Any wager placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest;

(2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and

(3) Any wager placed in a lottery conducted for profit.

* * * *

(c) *Other terms used*——

(1) *Wagering pool.* A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

* * * *

(4) *Conducted for profit.* A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

(26 C.F.R., Sec. 44.4421.1.)

Appendix B

EXHIBITS

Plaintiffs'	Identified	Offered	Received
1	II-R. 38	II-R. 38	II-R. 38
2	II-R. 93	II-R. 93	II-R. 93
3	II-R. 93	II-R. 93	II-R. 93
4	II-R. 93	II-R. 95	II-R. 96
Defendant's			
A	II-R. 24	II-R. 24	II-R. 24
B	II-R. 42-43	II-R. 42-43	II-R. 43
C	II-R. 42-43	II-R. 42-43	II-R. 43
D	II-R. 50-51	II-R. 51	II-R. 51
E	II-R. 63-64	II-R. 64	II-R. 64
F	II-R. 64	II-R. 64	II-R. 64
G	II-R. 64	II-R. 64	II-R. 64
H	II-R. 64	II-R. 64	II-R. 64
I	II-R. 64	II-R. 64	II-R. 64
J	II-R. 64	II-R. 64	II-R. 64
K	II-R. 74	II-R. 74	II-R. 74
L	II-R. 81	II-R. 81	II-R. 81
M	II-R. 82	II-R. 82	II-R. 82
N	II-R. 84	II-R. 84	II-R. 85
O	II-R. 85	II-R. 87	II-R. 87
P	II-R. 85	II-R. 87	II-R. 87